No. 678

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

GUY E. WILLIAMS, CHANCELLOR, etc.

PETITIONER

vs.

CLAUDE A. RANKIN

ARKANSAS COMMISSIONER OF STATE LANDS

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ARKANSAS

RESPONDENT'S BRIEF

Respondent protests the granting of a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas entered November 3, 1952, in the case of Claude A. Rankin, as Commissioner of State Lands for the State of Arkansas, Petitioner v. The Chancery Court of Pulaski County, Second Division, Hon. Guy E. Williams, Chancellor, Respondent, No. 9906, for the following reasons:

POINT I. *Moot.* All issues presented by Petitioner have become moot.

Petition for Rehearing having been denied by the Supreme Court of Arkansas on December 8, 1952 (R.59), on December 9, 1952, the Supreme Court of Arkansas issued its Mandate adjudging that the Pulaski Chance Court "is without jurisdiction to try the case of *Kimb.* v. *Rankin*, . . . and decreed that the Petition for Prohibi tion against Respondent and said Chancery Court, be, and the same is hereby granted" (R.64).

Thereafter, and before Petition for Certiorari was filed in this Court, the Respondent Claude A. Rankin, as Commissioner of State Lands for the State of Arkansas, issued and delivered to the purchaser State's "Island Deed No. 27". The Commissioner executed and delivered the identical Deed filed as Exhibit B (R.19-27) to his "Motion to Dissolve Temporary Restraining Order" filed in the Pulaski Chancery Court (R.15). As is stated in its recitals, this Island Deed conveyed "the third appearing Island described in the case of *Winford et al.* v. *Griffin* (C.C.A. 8th), 1 F. 2d 224, at the time of said Application being locally known as 'Harwood Island'" (R.20).

The purpose of the litigation in the Pulaski Chancery Court (R.11) was to perpetually enjoin and restrain the Respondent here from executing and delivering said Deed. The litigation in the State courts having run its full course, neither the Respondent nor the State of Arkansas have any further interest in the subject matter presented by Petitioner here. Respondent's action in issuing and delivering the Island Deed was expressly authorized by the Supreme Court of Arkansas. The majority Opinion written by Associate Justice Paul Ward states: "Since the Petitioner, as State Land Commissioner, was exercising the discretion given him under Act 282 and was directed under the Act to deliver a deed to the applicant, he was merely acting as an officer of the State in his ministerial capacity and can not be restrained from so acting by the

Chancery Court. This is the settled law in this State" (R.52).

It is therefore clear that certiorari would now be futile. The Island Deed is now an accomplished fact. It is duly recorded in the Deed Records of Chicot County, Arkansas. Any further litigation by Mr. Kimble must be against the purchaser in some court of competent jurisdiction in that county in which the land lies.

POINT II. "*Question Presented*". Petitioner's statement of the "Question Presented" (his Petition, hereinafter referred to as "Pet.", page 2) is wholly academic, and is in no way applicable to the record facts here involved.

1. "*Seize*". Petitioner repeatedly urges that Respondent had no right "to *seize* and sell . . . the land of a private citizen" (Pet. 7, 2, 6, 13). Here Respondent has neither *seized,* nor threatened to seize, anybody's land.

In his Complaint filed in Pulaski Chancery Court plaintiff R. V. Kimble alleged that he "and his predecessor in title have held the open, continuous, notorious, hostile, actual and adverse *possession* of said lands from the year 1914 *to date*" (R.13). He repeated this allegation in his First Amendment to his Complaint (R.28).

There is nothing in the record to suggest that this actual possession of Mr. Kimble has ever been disturbed. It has not. In Arkansas only by a suit in ejectment can the right to possession be tested. There is no law authorizing the Respondent to bring any such ejectment suit, and the Respondent never made, nor thought of making, any effort to oust Mr. Kimble from his alleged possession. That issue is left for future litigation between the purchaser and Mr. Kimble when neither the State of Arkansas, nor its agent the Respondent, will have any interest in

the litigation, and will not be parties thereto. Mr. Kimble's attempted litigation in the Pulaski Chancery Court (R.11) was historically *premature.* We find no instance of any similar attempt having ever been made before in the State of Arkansas.

2. *Judicial Review.* Equally fallacious is Petitioner's repeated theory and argument that the Respondent either had, or claimed, "absolute and *final* power to seize and sell land claimed to be owned by . . . a private citizen . . . , and at the same time deny that private citizen *access to the judiciary* to prove his alleged right, title and interest in and to said land" (Pet. 2-3, 7, 10, 12).

This Court will of course adopt the interpretation of the Supreme Court of Arkansas as to "a proper interpretation and application of the provisions of the 'Island Act', Act 282 of 1917 (set out in Arkansas Statutes as Sections 10-601 to 10-607, inclusive)" (R.51). In its Opinion the Supreme Court of Arkansas eliminates any possibility of a Federal question being presented in the instant Petition. This Court is assured that private citizen R. V. Kimble has lost no constitutional right whatever by the issuance of the Island Deed here involved. The Supreme Court of Arkansas plainly states:

"Assuming that the Land Commissioner delivers his deed to the prosepective purchaser, then Kimble may urge—either in a suit he may institute or in an action brought against him—*all the claims and defenses that he now has*" (R.54).

Chief Justice Griffin Smith, in his concurring opinion, again emphasizes that the private citizen's "right of judicial review" has not been impaired, in the following language:

"It is axiomatic that although an official's discretionary actions pursuant to a statutory directive cannot

be controlled by mandamus—and the corollary would be that such acts cannot be reached by injunction—*no right of judicial review can be denied in an independent suit brought to test the facts motivating or supporting the ministerial finding*—in this case the muniment of title 'as is now provided by law for the sale of state lands'. *The venue would be where the land is situated if in a single county*" (R.63-64).

The Island Act is mandatory that when the Commissioner in the exercise of his discretion has found land to be a true island, "the Commissioner *shall* issue to the applicant *a deed* conveying all the right, title, and interest of the State of Arkansas in and to said lands" (Sec. 10-604 Ark. Stats. Pet. 18).

If the State has no title, then none is conveyed. In Arkansas the Commissioner never warrants the State's title. The Island Act provides that islands shall be "sold and conveyed by the State in the same manner that lands forfeited to the State for the non-payment of taxes are now, or may hereafter be sold by the State" (Sec. 10-602, Ark. Stats.). The State gives "*only a quitclaim* to the land" (*Nevada County* v. *Dickey*, 68 Ark. 160 at 161-162, 56 S.W. 779; *Beloate* v. *Taylor*, 202 Ark. 229 at 235, 150 S.W. 2d 730).

Mr. Justice Ward in his opinion below makes it ineluctably clear that the Respondent neither has, nor claims, nor has ever undertaken to exercise "*final* power" which would bar Mr. Kimble from "taking his cause to the judiciary to prove his alleged ownership" (Pet. 13). For the court Justice Ward stated:

"Said Act 282 never contemplated that the State Land Commissioner should do more than make an *initial* determination as to whether lands found in the navigable streams of this State were formed by accretion or as an island . . . No provision is made for the Land Commis-

sioner to make a *final* determination as to how the land was formed . . . It is obvious that *before litigation can arise* over the question of whether certain lands were formed by accretion or as an island, someone must make the initial determination and in doing so must exercise choice or *discretion.* Act 282 clothed the State Land Commissioner with this choice or discretion. This being true, he had no alternative other than to exercise his discretion when application is made. From *State* v. *Guthrie,* 203 Ark. 60, 156 S.W. 2d 210, we quote, on this point, the following:

'The Land Commissioner, who conveyed for the State, was acting as its agent. He was required to comply with every provision of Act 282.' . . .

"The last quoted case, which involved an interpretation of the duties of the State Land Commissioner under Act 282 also recognized that the Commissioner was invested with discretion and that his decision was *not final"* (R.51-52).

That the Respondent has always conceded the right of Mr. Kimble to a judicial inquiry as to the correctness of the Respondent's finding is pointed out in the lower court's decision as follows: "This right of Kimble in this case to go into a court of competent jurisdiction and litigate the finding of the Land Commissioner (in which he determined the land to be an Island) is not only not questioned by the Petitioner (Land Commissioner) but is positively affirmed repeatedly in the Reply Brief" (R.52).

In fact, there are numerous decisions of the Supreme Court of Arkansas which point out the fact that R. V. Kimble's remedy, if any, is to attack the Island Deed for invalidity *after* it has been executed and delivered by the Commissioner of State Lands, when it is no longer neces-

sary to make the State of Arkansas, or its executive agent the Commissioner of State Lands, party to the action.

Among other instances where an executed and delivered Island Deed was subjected to judicial review in Arkansas are the following cases: *Underdown* v. *Desha,* 142 Ark. 258, 219 S.W. 19; *State* v. *Guthrie,* 203 Ark. 60, 156 S.W. 2d 210; *Conway* v. *Shuck,* 203 Ark. 559, 157 S.W. 2d 777; *Crow* v. *Johnston,* 209 Ark. 1053, 194 S.W. 2d 193; *Wunderlich* v. *Cates,* 213 Ark. 695, 212 S.W. 2d 556; *Williamson* v. *Chicago Mill & Lumber Co.,* 51 F. 2d 551; *Baxter* v. *McGee,* 82 F. 2d 695; and *Anderson-Tully Co.* v. *Murphree,* 153 F. 2d 874. This has always been the exclusive method in Arkansas of testing the validity of the Commissioner's judgment and action.

The Island Act has been enforced in Arkansas for some thirty-six years. As construed by the Supreme Court of Arkansas there is absolutely nothing unconstitutional about it. See Appendix A at end of this Brief.

Mr. Kimble's attempted action in the Pulaski Chancery Court was a case of first impression, and was *premature.* It was properly dismissed by the Supreme Court of Arkansas.

3. *Burden of Proof.* Incidentally, Petitioner is again in error in arguing that:

"Mr. Kimble will lose as against this *prima facie* title of the State. The burden of proof, a shield to which Mr. Kimble would otherwise be entitled, has been allowed to shift" (Pet. 8).

Not so. In the very next paragraph Petitioner states: "The action brought by Mr. Kimble in the Chancery Court of Pulaski County, Arkansas, is one by a plaintiff capable of suing" (Pet. 8). Quite so. But when he voluntarily became a plaintiff he certainly assumed the burden of prov-

ing each and all of the material allegations of his Complaint—in short his ownership.

Since the Island Deed has been delivered, if Mr. Kimble sees fit to institute new litigation to test his title he will still bear *the same burden of proof* in order to establish his ownership. The lower court has assured him that he will then have "all the claims and defenses that he now has" (R.54).

POINT III. *Factual Statement.* The Petition filed here discusses a theoretical situation which is not applicable to any of the actual facts presented in the record of the lower courts.

A correct statement of the actual facts before the lower courts is found in Respondent's "Motion to Dissolve Temporary Restraining Order", with Exhibits "A" and "B" (R.15-27) filed in the Pulaski Chancery Court.

These indisputable facts were supported by the oral evidence of the Respondent in the Pulaski Chancery Court when he testified officially as Commissioner of State Lands for the State of Arkansas (R.33-43).

This testimony stands uncontradicted in the record. Respondent testified that he had no "individual interest whatever in any of the property referred to in the pleadings in this case" (R.33); that he had no "intention of conveying any part of Island 87 . . . or accretions thereto" (R.34); that he had no personal interest at all in the $3,018.55 which he had collected for timber cut from Harwood Island while the Application to Purchase was pending before him, and that this timber money was owned by the State of Arkansas and would eventually be put into the State Treasury (R.38-40).

These *facts* were correctly referred to in the "Petition for writ of Prohibition" filed by Respondent here in

the Supreme Court of Arkansas (R.1-5) which presented for decision of the Supreme Court of Arkansas only two issues, which, in its prayer, are stated as follows:

"That upon final hearing it be adjudicated by this Court that the lower court is without jurisdiction of either the subject matter or the person of this Petitioner in his official capacity because:

"1. The action in the lower court is in legal effect a suit against the State of Arkansas;

"2. It is furthermore an action to try title to lands lying in Chicot County in the State of Arkansas, and the proper venue for such an action lies in a court of competent jurisdiction in Chicot County, Arkansas" (R.4).

The pleadings in the lower courts leave no basis whatever for the Petition for Certiorari filed in this Court advancing the argument that the Arkansas Island Act is unconstitutional, and has deprived a private citizen of due process of law.

As a matter of record, the ownership of Harwood Island has already been thoroughly tested by judicial review by Mr. Kimble's immediate predecessor in title.

In his "Amendment to Complaint" filed in the Pulaski Chancery Court, Mr. Kimble continued to insist that: "3. Plaintiff and *his predecessors in title* have been in the continuous, undisturbed and exclusive possession thereof since before the year 1914, paying all taxes assessed and levied by the State of Arkansas thereon since prior to the year 1914" (R.28).

As stated in the Court's Opinion by Justice Ward: "In the year 1933 the said Kimble bought Island 87 together with all accretions thereto belonging. His grantor was the daughter and sole heir of the said J. W. Griffin" (R.50). This is the identical J. W. Griffin who tested in

the courts his claim of title to what is now known as Harwood Island, and lost.

The judicial history of Harwood Island began prior to July 18, 1924, when the U. S. Court of Appeals, 8th Circuit, affirmed the U. S. District Court in holding that the area now known as Harwood Island was *not accretion* to original Island 87 *as was then contended by J. W. Griffin,* nor accretion to Island 86 as was then contended by J. T. Chambers, but was in fact *a third Island* formed independently in the Mississippi River and was *owned by the State of Arkansas. Winford* v. *Griffin,* 1 F. (2d) 224.

In its perspicuous opinion the court describes the origin of the Island as follows:

"An understanding of the physical situation, disclosed by the record, must be had before the contention of the respective parties may be appreciated. The river in its southward course makes a sharp bend to the west. Island 86 lies just below the bend on the Arkansas side and is owned by Chambers . . . Originally there was a chute or channel between Island 86 and the bank. It is now filled up and overgrown with vegetation, but its course is clearly marked and can be followed. Island 87 is in part alongside Island 86, but it extends much farther down the river. There was a chute between the two islands and it extended on down between Island 87 and the Arkansas side. For many years it carried a considerable volume of water. When the river was high boats reached a landing through it. By accretions to the lower end of Island 87 it continued to extend slowly and imperceptibly down the river, the water in the chute between Island 87 and the Arkansas side became of less volume and depth, and the landing had to be abandoned about 1897. Then it was that W. H. Lacy, who owned, resided upon and cultivated Island 87, conveyed to B. G. Kiger the 50-acre tract across the Island extending from the chute on the north to the river bank on the south side of the Island. . . . This landing place was later obstructed by *a sand bar in front of it*

which made slowly down the river from above, and it also had to be abandoned. The *bar* continued to extend on down the river, *leaving a chute between it and Island* 87. In later years the bar in places became dry land and was covered with willows and small cotton-wood. The great weight of the evidence convinces that *this bar first appeared and began to form in the river off Island* 86 and made down the river from that point alongside the two Islands, *leaving a chute between it and them.* As the bar rose above high water mark the chute gradually filled in from its upper end down the river between the two Islands. At the time of the trial it was open at the lower end and there was water in it much of the way except at its upper end, where it had filled and was covered with vegetation. So it appears that THREE *Islands* were successively formed at and just below this bend, each in part opposite the other and each in turn extending farther down the river." *Winford* v. *Griffin,* 1 F. (2d) 224-225.

As is recited in his Island Deed which Respondent has now executed and delivered, the Application upon which the Commissioner acted was this "third appearing Island described in the case of *Winford* v. *Griffin* (C.C.A. 8th), 1 Federal Reporter 2d Series, 224, at the time of said Application being locally known as 'Harwood Island'" (R.20).

Thus is Petitioner's furor of unconstitutionality deprived of any factual basis in the present instance. The issue of the ownership of Harwood Island is really *res judicata.* Mr. Kimble's grantor had no title to convey, because the Circuit Court of Appeals affirmed the U. S. District Court in holding that this third Island, now known as Harwood Island, was not accretion to Island 87 as claimed by J. W. Griffin, but was an island arising from the bed of the Mississippi River in Chicot County, Arkansas, and was therefore *owned by the State of Arkansas. Winford* v. *Griffin,* 1 F. 2d, 224 at 225.

After exhaustive hearings and research extending over a period of more than four years, the Respondent here reached the same decision as the Courts had reached in *Winford* v. *Griffin, supra,* in 1924 (R.18-19), in which former litigation Mr. Kimble's immediate predecessors in title had enjoyed to the limit ample due process of law.

Nevertheless, as is hereinbefore quoted, the Supreme Court of Arkansas has assured the litigious Mr. Kimble that he can still have another judicial test of his alleged ownership if he so desires. The Courts of Arkansas, of competent jurisdiction, are open for Mr. Kimble to attack the Island Deed here involved on the ground that the decision of the Commissioner of State Lands was erroneous.

It is true that such an attempt would be expensive and probably futile because his own wise and able lawyer frankly tells this Court that: ". . . all things being equal in succeeding litigation, *Mr. Kimble will lose* as against this *prima facie* title of the State" (Pet. 8).

POINT IV. *Suit against the State.* Petitioner correctly states:

"The apparent theory of the Arkansas Supreme Court in granting Writ of Prohibition was that the suit of Mr. Kimble against Mr. Rankin in the Chancery Court of Pulaski County, Arkansas, was, *per se,* a suit against the State of Arkansas and thereby contrary to Article 5 Section 20 of the Constitution of Arkansas" (Pet. 5).

This has now become the law in the instant proceeding. In so holding, the Supreme Court of Arkansas merely followed a line of its own earlier well-considered decisions.

"The State of Arkansas shall never be made defendant in any of her Courts." Article 5 Sec. 20, Constitution of Arkansas.

The principle of law here involved is ably and irrefutably discussed by McCulloch, C. J., with his customary clarity in the leading case of *Pitcock* v. *State,* 91 Ark. 527, 121 S.W. 742, 134 Am. St. Rep. 88. There the Court states *the test* to be as follows:

"If the State is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the State, and falls within the rule of prohibition. *Poindexter* v. *Greenhow,* 114 U.S. 270; *Hagood* v. *Southern,* 117 U.S. 52; *In the Matter of Ayers,* 123 U.S. 443; *Pennoyer* v. *McConnaughy,* 140 U.S. 1; *Fitts* v. *McGhee,* 172 U.S. 516; *Farmers National Bank of Hudson* v. *Jones,* 105 Fed. 459; *Louisiana* v. *Jumel,* 107 U.S. 711." *Pitcock* v. *State, supra;* 91 Ark. at 535-536.

The pertinent conclusions of the Court are stated in the syllabi as follows:

"3. Where the pleadings in a case show on their face that the Court is wholly without jurisdiction of the subject matter set forth therein, any preliminary order made or final judgment rendered is void" (91 Ark. at 527-528).

"4. A suit the purpose of which is to restrain an attempted breach by the penitentiary board of a contract alleged to have been entered into by such board on behalf of the State whereby convict labor should be furnished to the plaintiff *is in effect a suit against the State* and cannot be maintained." (91 Ark. at 528.)

"5. Where the pleadings show that a suit is in effect against the state, though nominally against certain State officers, *the trial court had no jurisdiction,* and *a temporary restraining order issued by it will be quashed on certiorari.*" (91 Ark. at 528.)

We further quote from *Pitcock* v. *State, supra,* the following statements of principles applicable to the facts now before this Court:

". . . If the decree was rendered without jurisdiction, it can be disobeyed with impunity, for no one owes obedience to a void decree, as it is without any force whatever. 'A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers.' *Rankin* v. *Schofield,* 81 Ark. at 463." (91 Ark. at 534.)

"The first and only question necessary for us to determine in this case is whether or not this is a suit against the State; for, if it is, then the Chancery Court was wholly without jurisdiction to proceed, and all orders and judgments attempted to be rendered therein were void. *In the matter of Ayers,* 123 U.S. 443. A sovereign state cannot be sued except by its own consent; and such consent is expressly withheld by the Constitution of this State. Art. 5 Sec. 20." (91 Ark. at 535).

"In *Fitts* v. *McGhee, supra* . . . the Court said: 'As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, *is one which restrains the State itself,* and the suit is consequently as much against the State as if the State were named as a party defendant on the record' " (91 Ark. at 536).

"In actions against officers of the United States, the same principle has been announced" (cases cited). (91 Ark. at 537.)

"In determining whether a suit is against the State, it is unimportant whether the contract sought to be enforced, or the breach of which is sought to be enjoined, is or is not a valid one" (91 Ark. at 538).

Wood, J., (concurring) pointed out: "The court was without jurisdiction of the State, a necessary party. One

of the *essentials of jurisdiction is that the court have before it the proper parties"* (cases cited). (91 Ark. at 541).

As is pointed out by the court in *Pitcock* v. *State, supra,* the federal courts apply the same rule with reference to Amendment 11 of the federal Constitution. We refer to two of the cases cited by Judge McCulloch:

". . . the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." *Pennoyer* v. *McConnaughy,* 140 U.S. 1; 35 L.ed. at p. 366.

"Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the case." *Ex parte Ayers,* 123 U.S. 443; 31 L.ed. 216.

In addition to *Pitcock* v. *State, supra,* this thesis is also solidly supported by *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S.W. 663, and *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S.W. 121, Ann. Cas. 1914A 351.

". . . the pleadings and the testimony show conclusively (the action) is in effect and in fact a suit against the State. The Penitentiary Board is but *an agency of the State,* composed of certain officials thereof for the conduct and management of the State Penetentiary . . . This suit was against the State officers . . . , not in their personal or individual capacity, but in their official capacity as said board . . . ; and the court was without jurisdiction to hear it and render the judgment and *this without regard to whether the claim was just and meritorious or not. Pitcock* v. *State,* 91 Ark. 527. The court being without jurisdiction, its judgment was void." *Jobe* v. *Urquhart, supra,* 98 Ark. at 528-529, cited with approval in *Jobe* v. *Urquhart,* 102 Ark. at 482.

In the second *Jobe* v. *Urquhart* case which sought to mandamus the State Auditor, the Court held:

". . . this suit must fail by reason of the well recognized rule of law, adhered to by both the Federal and State courts, that an officer of the executive branch of the government can not be controlled by the court in the exercise and performance of his official acts, *involving his judgment and discretion*" 102 Ark. 477.

This principle was applied in a suit in the Pulaski Chancery Court against the State Treasurer and the State Auditor and the Secretary of the Arkansas Corporation Commission wherein this Court said:

"It is well settled, as stated in 59 C.J., p. 307 'that the question of whether a particular suit is one against the State is not to be determined solely by reference to the nominal parties to the record, and the fact that the State is not named as a party defendant does not conclusively establish that the suit is not within the rule prohibiting suits against the sovereign without its consent.' In Section 464, same volume, it is said 'While a suit against state officials or agencies is not necessarily a suit against the State, *the general rule* that a State cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of the State when the real claim is against the State itself, and it is the party vitally interested. Accordingly it is well settled, as a *general proposition*, that, where a suit is brought against an officer or agency *with relation to some matter in which defendant represents the state* in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, *will operate to control the action of the state* or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent. . .'

"We agree with appellant that this is necessarily a suit against the State and cannot be maintained. Appel-

lees contend with much force that it is merely a suit against the officers of the State and does not seek to subject the State to any actual liability; that the State cannot lose anything by this action, and that it should not be heard to object that the money which it owes to the assessors and clerks should be impounded and subjected to the claim of creditors of these persons. Nevertheless, . . . *it is an attempt to take from the State the control and disposition of its money, to impound it in the registry of the court and to pay it out according to the order of the court*" (cases cited). *Page* v. *McKinley,* 196 Ark. 331 at 336-337, 118 S.W. 2d 235.

"The (State) Land Commissioner, who conveyed for the state, was acting as its agent. He was a creature of the law and bound to obey it. He was required to comply with every provision of Act 282, now (Secs. 10-601 to 10-609, inclusive, Arkansas Statutes)" *State* v. *Guthrie,* 203 Ark. 60, syl. 6, and at p. 65; 156 S.W. 2d 210.

The action in the Pulaski Chancery Court was undoubtedly in effect, and legally in fact, one against the State of Arkansas.

It sought to recover money owned, or claimed, by the State of Arkansas, and to prevent the Commissioner from discharging his statutory duty to dispose of land owned, or claimed, by the State of Arkansas.

This was a correct adjudication of the first of the two issues presented to the Supreme Court of Arkansas by the present Respondent's Petition for a Writ of Certiorari to the present Petitioner (R.4).

POINT V. *Injunction will not issue to control a State Executive Officer in the performance of his Statutory duty involving the Officer's discretion and judgment.* The law of this case on this point is clearly stated in the concurring opinion of Chief Justice Griffin Smith. This point

is well settled in Arkansas. Chief Justice Griffin Smith says: "It is axiomatic" (R.63).

"The statutory definition of 'mandamus' is 'an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or *omit to do an act,* the performance or omission of which is enjoined by law.' " *Miller* v. *Tatum, Judge,* 170 Ark. 152, at 160, 279 S.W. 1002; 3 Arkansas Statutes Sec. 33-102.

It is thus seen that the word "mandamus" by statutory definition covers the word "injunction" and such a "Restraining Order" as was issued in this case by the Pulaski Chancery Court.

"It is a settled rule of law, recognized by this Court in numerous decisions, that mandamus will not lie to control an officer in the performance of *a discretionary act* nor to control the discretion of an officer in the performance of his duty where such *discretion* is vested by law, but will only lie to compel an officer to exercise his discretion where he has refused to act at all (cases cited)." *Miller* v. *Tatum, Judge, supra,* 170 Ark. at 160, 279 S.W. 1002.

". . . this suit must fail, by reason of the well recognized rule of law, adhered to by both the Federal and State courts, that *an officer of the executive branch of the government can not be controlled by the courts in the exercise and performance of his official acts, involving his* JUDGMENT *and* DISCRETION." *Jobe* v. *Urquhart,* 102 Ark. 470, at 477, 143 S.W. 121.

"Since by express terms the Act is not applicable to lands formed by *accretion,* it necessarily follows that *the Commissioner, in making the sale, must have found that Harshman's Island was not accretion.*" *Wunderlich* v. *Cates,* 213 Ark. 695 at 702, 212 S.W. 2d 556.

It therefore follows that Respondent, the Commissioner of State Lands, *in the exercise of his official judgment and discretion, could not be controlled or restrained by in-*

junction or mandamus issued by the Pulaski Chancery Court. This has long been well settled in Arkansas.

Such an action as that filed by private citizen Kimble in the Pulaski Chancery Court against the Commissioner of State Lands had never before been attempted in Arkansas.

The syllabus to *Lewis* v. *Owen,* 146 Ark. 469, 225 S.W. 648, cited by Chief Justice Griffin Smith in his concurring opinion, reads as follows:

"MANDAMUS—DETERMINATION OF LAND COMMISSIONER.—Under Acts 1917, p. 1468, authorizing the Commissioner of State Lands to dispose of islands in the navigable streams of the State, and providing that his determination of facts should be final, in the absence of fraud or collusion, HELD that *the Commissioner's decision that the land which petitioner sought to buy was not an island can not be corrected or controlled by mandamus.*" 146 Ark. at p. 469.

Lewis v. *Owen, supra,* was an action for mandamus directing the Commissioner of State Lands under the Island Act to execute a deed to the applicant. A *demurrer* to the Complaint was *sustained,* and the action was dismissed.

From the opinion we quote the following:

"The order of the court below is defended upon two grounds, (1) that *the finding of the Commissioner is conclusive,* and (2) . . . We find the first contention well taken, and do not, therefore, consider the second one." 146 Ark. at p. 471.

"The Legislature constituted the Commissioner of State Lands as *the Agent of the State* in disposing of islands in the navigable streams of the State, and by section 5 of the Act of 1917 *he was given a* DISCRETION *in the discharge of his duties.* This was done because it was necessarily contemplated that there might be conflicting

applications to buy the same island, and that there might be *questions of fact for the Commissioner to decide.* This section 5 gives the Comissioner the right, and imposes upon him the duty, of establishing rules and regulations by which these conflicts may be determined and questions of fact decided and provides that '*the determination of the said Commissioner*, in the absence of fraud or collusion, *shall be final.*'

(The Commissioner's decision that land is *not* an island is indeed final so far as the *State* is concerned. But his decision that land *is* an island is *not final* as to an adverse private claimant as is clearly pointed out in the decision of the Supreme Court of Arkansas in the instant case.)

Quoting further from *Lewis* v. *Owen, supra*:

"There is no allegation of fraud or collusion on the part of the Commissioner, but the complaint does allege that the Commissioner 'arbitrarily refused to sell plaintiffs said island without any good and lawful excuse for his said refusal'. But the Act confers on the Commissioner the authority only to sell islands which have formed, or may form, in the navigable streams of the State, and the complaint contains the recital that the Commissioner *has announced his decision* to be that the land which appellants desire to buy is not an island.

"There is, therefore, no refusal of the Commissioner to act on appellant's application. It has been passed upon, and denied. *The Commissioner's decision may have been erroneous, but it can not be corrected or controlled by mandamus* (cases cited)." *Lewis* v. *Owen*, 146 Ark. 469, at pp. 471-472.

This principle was restated, and reaffirmed, in *Reed* v. *Wilson*, 163 Ark. 520, 260 S.W. 438, syl. 4, reading:

"Mandamus—matter of discretion.—Since Acts 1917, p. 1468 (the Island Act), *vests in the State Land Commissioner the* DISCRETION of determining whether an Island in a navigable stream is agricultural OR ACCRETION LAND, or is below the mean high-water mark of the river, *such* DIS-

CRETION *cannot be controlled by mandamus.*" 163 Ark. at p. 521.

In *Reed* v. *Wilson, supra,* the Court sustained a demurrer and dismissed the action which sought to force the Commissioner of State Lands to execute an Island Deed. The demurrer to the jurisdiction of the Court was *on the ground* that *the action was, in effect, one against the State,* which could not be maintained under the Constitution. 163 Ark. at p. 522.

After reviewing the statutory duties of the Commissioner of State Lands under the Island Act, in its Opinion the Court states:

"Where a public official fails to perform a *purely ministerial duty,* INVOLVING NO DISCRETION, he may be compelled to do so by mandamus; . . . *The only theory upon which the officer can be sued at all is that he is not the representative of the State,* but that his wrongful act of omission is attributable to his refusal to discharge a duty imposed upon him by law. . . Another answer to the contention of appellant is that *the statute relating to sales* of lands of this character reposes in the Commissioner of State *Lands a* DISCRETION *in determining whether the lands sought to be purchased fall within the terms of the statute,* for there is an express provision in Section 7 that non-agricultural lands, *nor* ACCRETION *lands,* nor lands below the mean high-water mark of a river, are not subject to sale under this statute. *This inhibition necessarily implies the exercise of* DISCRETION on the part of the Commissioner in determining WHETHER OR NOT *the lands are subject to sale, and that discretion cannot be controlled by mandamus. Lewis* v. *Owen,* 146 Ark. 469." *Reed* v. *Wilson,* 163 Ark. 520, at pp. 523-524, 260 S.W. 438.

In *State of Arkansas* v. *Rust Land & Lumber Company,* 51 F. 2d 555 at 556, Judge Martineau, as the Federal Court, followed the Arkansas rule as established in the two preceding cases as follows:

"Since there is doubt and uncertainty as to the character of these lands, *the Island Act reposed in the Commissioner the discretion of determining whether the lands were island lands or lands of a different class.* His determination that they were island lands and his conveyance of them to the defendants for a valuable consideration as that class of lands *is conclusive as against the state,* since neither fraud nor collusion is alleged or proved. The fact that others might differ with him as to whether these were island lands or not is not enough to justify the cancellation of his deed. The proof in this case is sufficient to show that *in the exercise of a sound discretion reposed in him by law* he could reasonably and honestly classify those lands as island lands. *Lewis* v. *Owen,* 146 Ark. 469, 225 S.W. 648; *Reed* v. *Wilson,* 163 Ark. 520, 260 S.W. 438."

The cases of *Reed* v. *Wilson, supra,* and *Lewis* v. *Owen, supra,* were again approved and cited by the Supreme Court in *State* v. *Guthrie,* 203 Ark. 60, at 64, 156 S.W. 2d 210.

The foregoing decisions were again cited with approval in the case of *Conway* v. *Shuck,* 203 Ark. 559, 157 S.W. 2d 777, where the Court said:

"The State Land Commissioner has determined that the island here involved is in Arkansas, has caused a survey thereof to be made by a surveyor appointed by him, . . . has sold the same to the appellants and executed his deed therefor . . . , and we think *the finding by the Commissioner is conclusive and binding on everyone,* except the State of Tennessee, in a proper action and in the proper forum, and except some person holding a claim of title from the State of Arkansas under some other statute, or from the State of Tennessee, or through mesne conveyances originating from either State." 203 Ark. 26 560.

"And it was held in these cases, to quote a headnote from *Reed* v. *Wilson, supra*: 'Since Acts 1917, p. 1468 (the Island Act) vests in the State Land Commissioner

the discretion of determining whether an island in a navigable stream is agricultural *or accretion land,* or is below the mean high-water mark of the river, *such discretion cannot be controlled by mandamus.'* " 203 Ark. at 561.

And in the late case of *Wunderlich* v. *Cates,* 213 Ark. 695, 212 S.W. 2d 556, the Court cited and followed *Lewis* v. *Owen, supra,* and *Reed* v. *Wilson, supra,* and approved the statement of Judge Martineau hereinbefore quoted, as follows:

"See *Lewis* v. *Owen,* 146 Ark. 469 . . . , where it was held that in the absence of fraud or collusion the *Commissioner's decision* that land the petitioner sought to buy was not an island *could not be controlled by mandamus, even if erroneous.* Judge John E. Martineau, United States District Judge, said that the Arkansas decisions were authority for the proposition that *a determination by the Land Commissioner* that lands deeded under Act 282 were island formations *concluded the State* from contending otherwise, in the absence of fraud or collusion" (cases cited). 213 Ark. at p. 702, *supra.*

The Commissioner of State Lands is a constitutional executive officer of the State. His functions "call for the exercise of sound judgment and wise discretion" which will not be controlled by inferior courts. *After* the Commissioner has acted *the courts will review* in an action in a court of competent jurisdiction and adjudicate whether or not the Commissioner's deed was valid or erroneous. Mr. Kimble's action in Pulaski Chancery Court was *premature,* and was therefore properly dismissed by the Supreme Court of Arkansas.

Point VI. *Venue.* Referring to the case of *R. V. Kimble* v. *Claude A. Rankin, as Commissioner of State Lands for the State of Arkansas* filed in the Pulaski Chancery Court (R.11), in his concurring opinion Chief Justice Griffin Smith plainly stated: "The venue would be where the land is situated if in a single county" (R.64).

This is settled Arkansas practice and civil procedure. Under no circumstances could Mr. Kimble have properly filed his attempted action to try title to Harwood Island in the Chancery Court of Pulaski County. Harwood Island lies wholly in Chicot County (R.11,49). Therefore exclusive jurisdiction of any action to try title is vested in some court of competent jurisdiction in Chicot County, Arkansas. This was the second and last issue presented to the Supreme Court of Arkansas (R.4).

Section 27-601, Arkansas Statutes (Civil Code Sec. 84) provides: "Actions for the following causes MUST *be brought in the County in which the subject of the action,* or some part thereof, is situated. . ." First. For the recovery of *real property,* or an *estate or interest therein.*"

In discussing this section in the recent case of *Drum* v. *McDaniel,* 215 Ark. 690, 222 S.W. 2d 59, the Court said:

"The first . . . subdivision of Ark. Stats. (1947), Sec. 27-601, provides that suits 'for the recovery of real property' . . . *must* be brought *in the County* where the *subject of the action* or some part thereof is situated. In *Harris* v. *Smith,* 133 Ark. 250, 202 S.W. 244, the Court said in reference to this statute: 'It seems to be well settled that if the purpose of the bill and the effect of the decree are to reach and operate upon the land itself, then it is regarded as a proceeding *in rem,* and, under the statute in question, is *a local action* and must be brought in the county where the land is situated. *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark. 422; *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S.W. 762, 29 Am St. Rep. 56.

"In *Jones* v. *Fletcher, supra,* the court in discussing Sec. 27-601, *supra,* said: 'It is very clear that the Legislature intended, in the adoption of Sec. 4532, Gantt's Digest (Sec. 84, Civil Code), as a part of our code procedure, to make *all actions whether at law* OR IN EQUITY, *where the judgment or decree is to operate directly upon the estate* or title, local, and to restrict the remedy to the

tribunal of the county where the subject of action, or some part of it, is situated. All such actions, whether by name foreclosure, partition, ejectment, or *without any special designation as to title, whether expressly mentioned in the statute or not, are local* within the meaning of this section. *The Courts will look to the effect of such judgments and decrees, and endeavor to give full force to the statute, and carry out the defined policy of the legislative department in limiting the remedy to the proper courts of the county where the land lies.'* See, also, *Dowdle* v. *Byrd, Guardian,* 201 Ark. 775, 147 S.W. 2d 343."

Drum v. *McDaniel,* 215 Ark. 690, at 694, 222 S.W. 2d 59.

"There can be little question about the ancient law. We have not changed our venue statute. It is the same now as when we adopted the Code. It was declaratory then and now of the common law of venue." *Western Union Telegraph Co.* v. *Bush,* 191 Ark. 1085 at 1093, 89 S.W. 2d 723.

In addition to the cases cited in *Drum* v. *McDaniel, supra,* to the same effect see also *Fidelity Mortgage Co.* v. *Evans,* 168 Ark. 459, 270 S.W. 624, which holds:

"VENUE—An Action *to remove a cloud* upon the title to land is *a local action* within (Sec. 27-601, Arkansas Statutes), and should be brought *in the County in which the land is situated."* syl. 1, 168 Ark. at 459, 270 S.W. 624.

The instant action in the Pulaski Chancery Court was in effect an action *to prevent* "a cloud upon the title to land" and is therefore "a local action".

In *Arkansas Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S.W. 2d 1003, the Court again said:

"It seems to be well settled that if *the purpose* of the bill and the effect of the decree are *to reach and op-*

erate upon the land itself, then it is regarded as a proceeding *in rem,* and, under the statute in question is *a local action, and* MUST *be brought in the county where the land is situated* (cases cited)." 181 Ark. at 726, 27 S.W. 2d 1003.

It therefore seems clear that where *the title* to land is involved, to be recovered *or protected,* the action is local and lies *only* in the proper court "of the county wherein the land is located". *Crowe* v. *Davidson,* 189 Ark. 414, syl. 3, 72 S.W. 2d 763.

This action is in effect Plaintiff's attempt *to* QUIET *his alleged title,* which is again a local action, the venue lying only in the County in which the land is situated. Sec. 34-1902, Arkansas Statutes (1947).

". . . the Chancery Court of *the County in which the greater portion of the lands,* whose title was sought to be quieted was situated, had jurisdiction, though a small portion of the lands was situated in another county." *Bowen* v. *Frank,* 179 Ark. 1004, syl. 2, 18 S.W. 2d 1037.

"If statutes pertaining to quieting title were repealed, jurisdiction would still exist and the power would remain in the chancery court *to remove clouds upon titles.*" *Patterson* v. *McKay,* 199 Ark. 140, 134 S.W. 2d 543, 3 Arkansas Statutes at p. 904.

CONCLUSION. From the foregoing it is obvious that the Supreme Court of Arkansas passed on no Federal question. To do so was not necessary. The Court merely applied well established principles of State practice. Pe-

titioner's petition for certiorari should therefore be denied.

Respectfully submitted

TOM GENTRY, as Attorney General
for the State of Arkansas,
State Capitol Building,
Little Rock, Arkansas.

Of Counsel:
LAMAR WILLIAMSON, as
Special Assistant to
the Attorney General,
Monticello, Arkansas.

APPENDIX A.

The last expression of the Supreme Court of Arkansas on the private citizen's right to "access to the judiciary to prove, if he can, his ownership" (Pet. 10) *after* an Island Deed has been executed and delivered by the Commissioner of State Lands is succinctly summarized in the syllabi to the Opinion of the court below, as follows:

"Opinion delivered November 3, 1952.

"1. PROHIBITION.—The governing statute (Act 282 of 1917) contemplates that the Land Commissioner shall do no more than make an initial determination as to whether lands found in a navigable stream were formed by accretions or as an island; no provision is made for him to make a final determination as to how the land was formed.

"2. PUBLIC LAND.—Before litigation can arise over the question whether certain lands in a navigable stream were formed as accretion or as an island, some one must make an initial determination of that question, and Act 282 of 1917 clothed the Land Commissioner with power and discretion to make that determination.

"3. OFFICERS AND OFFICES—DISCRETION.—The Land Commissioner has, when application is made for that purpose, no alternative but to exercise his discretion to determine whether the land involved was formed as accretion or as an island.

"4. OFFICERS AND OFFICES—DISCRETION—PRESUMPTION. —While there is a presumption that the Land Commissioner correctly exercised his discretion in determining whether land formed in a navigable stream was formed as accretion or as an island, anyone desiring to question the correctness of his finding may do so in a court of competent jurisdiction.

"5. PROHIBITION.—Since petitioner, the Land Commissioner, was exercising the discretion given him by 282

of 1917, prohibition will not lie to prevent him from so doing.

"6. PROHIBITION.—Where the Land Commissioner had exercised his discretion by finding that the land involved was formed as an island and sold the land as such, the chancery court was without jurisdiction to restrain him from delivering the deed to the purchaser."

Rankin, Commissioner of State Lands v. *Williams, Chancellor*, Vol. 95 The Law Reporter 706 covering Opinions Delivered November 3, 1952, No. 18.

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